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No. 89-1749

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. McFARLAND, EDWARD M. KRESKY, and HENRY G. WILLIAMS, in their official capacity as Commissioners of the Public Service Commission of the State of New York,
Petitioners,

against

NATIONAL FUEL GAS SUPPLY CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE, STATE OF CONNECTICUT

Pursuant to Supreme Court Rule 37.5, the State of Connecticut, by its Attorney General, files this brief in support of the Petition for a Writ of Certiorari filed by the Public Service Commission of the State of New York, *et al.*, seeking review of a decision of the United States Court of Appeals

for the Second Circuit in *National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York, et al.*, 894 F.2d 571 (1990), attached as Appendix A, 1a–25a, to the Petition filed herein. The State of Connecticut regulates the siting of transmission lines for electricity and fuels through the Connecticut Siting Council, which has statewide jurisdiction analogous to that of the New York Public Service Commission ("PSC"), although it does not have exclusive jurisdiction over environmental matters. *See* Conn. Gen. Stat. § 16-50g. The purpose of the relevant Connecticut legislation is, *inter alia:*

> To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria . . . with minimal damage to the environment and other values described above.

Conn. Gen. Stat. § 16-50g. Natural gas transmission lines are included in the definition of "facility." Conn. Gen. Stat. § 16-50i(a).

The decision of the Court of Appeals for the Second Circuit could seriously curtail the ability of states to address specific, local environmental issues prior to construction of interstate natural gas pipelines. The decision adversely affects Connecticut's ability to protect the environment and ecology of the state and to minimize the impact of natural gas pipeline construction on the ecological, scenic, and historic environment of the state. The State of Connecticut, therefore, has a direct and substantial interest in this proceeding.

SUMMARY OF THE ARGUMENT

In the United States federal system, it is presumed that federal law does not preempt state law unless Congress intended preemption; the mere existence of federal law without that intent does not support a conclusion of preemption. State participation in regulation of the pipeline construction proposed by National Fuel Gas Supply Corporation ("NFG") has not been preempted by the Natural Gas Act ("NGA"), nor has it been preempted by the National Environmental Protection Act ("NEPA"). Instead, Congress presumed that the states would play a major part in resolving the local environmental problems associated with the siting of interstate pipeline facilities.

The review of the environmental impact of proposed interstate pipeline facilities is a fundamental national objective. However, Congress did not intend that all the goals of the NEPA would be fulfilled from Washington, D.C. Instead, the review of interstate pipeline facilities by state and local agencies is required to supplement federal law where federal agency action has failed to address site-specific questions or environmental issues of a local nature. The legislative history of the NEPA, the NEPA itself, and the regulations promulgated by the Federal Energy Regulatory Commission ("FERC") all provide for complementary action by state and local entities which does not interfere with the federal agency environmental review.

To fulfill the purposes of the NEPA, state and local review, licensing and certification must occur *before* construction. To allow only after the fact attempts by a state to "pursue whatever federal administrative and judicial remedies are available to compel that compliance [with the FERC order]," *National Fuel Gas* at 579, denies states the very role they must occupy in order to fulfill the fundamental purposes of the NEPA.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PREEMPT STATES FROM REGULATING SITE-SPECIFIC ENVIRONMENTAL ISSUES.

Where Congress expressly intended to preempt state law, preemption of state law exists under the Supremacy Clause of the U.S. Constitution, Article VI, cl. 2. *National Fuel Gas, supra* at 575.[1] Determining whether Congress has exercised this preemption power requires an examination of Congressional intent. *Northwest Central Pipeline Corporation v. Kansas*, ____ U.S. ____, 109 S.Ct. 1262, 1273 (1989). Intent can be inferred where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for states to supplement federal law. *Id.* at 1273, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Here, Congress clearly foresaw that states would supplement federal law in environmental regulation.

Connecticut concurs with the PSC in the conviction that neither the Natural Gas Act nor the National Environmental Policy Act preempts states from mitigating the site-specific effects of interstate gas pipeline projects. Petition at 9.[2] In enacting the National Environmental Policy Act in 1970,

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[1] For a listing of recognized grounds for federal preemption, *see Northwest Central Pipeline Corporation v. Kansas*, ____ U.S. ____, 109 S.Ct. 1262, 1273 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *State of California ex rel. State Water Resources Board v. FERC*, 877 F.2d 743, 746 (9th Cir. 1989) (appealed *sub nom California v. FERC*, No. 89-333, slip op. U.S. May 21, 1990).

[2] The Natural Gas Act, 15 U.S.C. § 717, *et seq.*, does not preempt all regulation of pipelines but explicitly reserves wide jurisdiction to states. It was enacted in 1938 to govern the transportation and sale of natural gas in interstate commerce and to govern natural gas companies. 52 Stat. 821, c. 556; 15 U.S.C. § 717 *et seq.* "The scheme was one of cooperative action between federal and state agencies," not sweeping preemption. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947).

Congress did not intend to preempt states from concurrent and cooperative regulation of environmental issues. The House of Representatives wrote of "a real need to involve State and local planning and action agencies, whose activities play a major part on the overall environmental problem, in the decisionmaking process." H.R. No. 378, 91st Cong. 1st Sess., 1969 U.S. Code Cong. & Admin. News 2751. The House also recognized that "State and local governments have a large stake in the common problem." *Id.* at 2758.[3]

The provisions of the NEPA include the Congressional declaration of national environmental policy, 42 U.S.C. § 4331, which

> declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Section 4332(C) of the NEPA directs that all agencies of the Federal Government make environmental statements, comments, and views "of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards" available to the President and the public. Sections 4334(2) and (3) also expressly direct federal agencies to coordinate with other federal *or state* agencies, and to be mindful of the "recommendations or certifications" of other federal *or state* agencies. Far from being preempted or

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[3] The Conf. Report No. 765, 91st Cong., 1st Sess., 1969 U.S. Code Cong. & Admin. News 2767, concerned with possible unreasonable delay in processing Federal proposals, stated that "[w]ith regard to State and local agencies, it is not the intention of the conferees that those local agencies with only a remote interest and which are not primarily responsible for development and enforcement of environmental standards be included." The PSC with its broad jurisdiction is clearly not among those local agencies having only a remote or parochial interest in environmental impact.

relegated to *post hoc* complaints, Congress recognized that state and local agencies would be authorized to act on environmental matters.

In *National Fuel Gas,* the Second Circuit ignored Congress' provision of a role for state and local agencies, analyzing the Natural Gas Act ("NGA") alone and finding that with the NGA Congress vested exclusive jurisdiction to regulate pipelines in the FERC. *Id.* at 576.[4] The Second Circuit erred by failing to recognize that the purposes of the NEPA, declared in 42 U.S.C. § 4331, require the cooperation of state regulatory bodies capable of reviewing the impact of federal proposals on areas of local concern at close hand. The PSC seeks not to deny the siting of the pipeline but to take the steps necessary to protect the land from the impact of that siting, such that "damage to the environment is kept within prescribed limits." Petition at 15; *California Coastal Commission v. Granite Rock Company,* 480 U.S. 572, 587 (1987). This is particularly important where a federal agency does not make a site-specific environmental review of a proposed pipeline route, but instead only relies upon generic data and provides only generic solutions to construction impacts on environmentally sensitive areas such as all wetlands or "all stream crossings."

This Court and the lower federal courts have considered numerous cases which turned on the question of whether aspects of regulation of natural gas pipelines had been preempted by federal law and regulation. *See, e.g., Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293 (1988) (Michigan's pre-issuance review of securities preempted by FERC legislation and extensive regulations regarding financing); *ANR Pipeline Co. v. Iowa State Commerce Commission,* 828 F.2d 465 (8th Cir. 1987) (Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671, *et seq.,* preempted state law on substantive safety regulation of interstate gas pipelines); *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84,

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[4] *See* n. 2, *supra.*

90 (1963) (production or gathering of natural gas reserved to the states); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (control over drilling and spacing of wells reserved to the states).

The Second Circuit's reliance on *Schneidewind* is flawed. *National Fuel Gas* at 576–77. Environmental regulation was not an issue nor in any way a part of *Schneidewind*. In that case, this Court held that a natural gas company's capital structure is related directly to the rates FERC allows it to charge. *Id.* at 299–300. Therefore, Michigan's pre-issuance review of securities to be issued by the company was preempted by the comprehensive federal regulatory scheme. The objectives of the Michigan statute were found to "amount[ ] to a regulation of rates and facilities, a field occupied by federal regulation." *Id.* at 207.

The case now presented to the Court concerns an important aspect of regulation in which Congress intended the states to *supplement* federal law. Environmental regulation has neither been marked out for comprehensive and exclusive federal control nor left entirely to the states. Cooperative effort was intended by Congress, but this necessarily interlocking regulation is defeated by the Second Circuit's allowing NFG to commence construction without a site-specific environmental review of the proposed construction by either the FERC or the appropriate state agencies. The federal objectives of NEPA and the NGA can both be achieved only by allowing concurrent regulation.

II. THE FEDERAL ENERGY REGULATORY COMMISSION'S REGULATIONS PROVIDE A ROLE FOR STATES IN ENVIRONMENTAL REGULATION OF INTERSTATE GAS TRANSMISSION LINES.

In *National Fuel Gas*, the Second Circuit correctly stated that federal regulations promulgated by an agency pursuant

to its delegated authority may preempt state law as readily as federal statutes. *Id.* at 576. The NEPA directed Federal agencies to review their administrative regulations, policies, and procedures to conform to national environmental policy. 42 U.S.C. § 4333. FERC promulgated regulations which require an applicant under the Natural Gas Act to, *inter alia:*

> [c]onsult with the appropriate Federal, regional, State and local entities during the preliminary planning stages of the proposed action to assure that all environmental factors are identified.

18 C.F.R. Part 380, App. A ¶ (5) (1989).

The applicant is also required, as part of its NEPA evaluation, to

> [i]dentify all necessary Federal, regional, State and local permits, licenses, and *certificates* needed before the proposed action can be completed, *such as permits needed from State and local agencies for construction* and waste discharges. Describe steps which have been taken to secure these permits and any additional efforts still required.

18 C.F.R. Part 380, App. A ¶ 9.1 (1989) (emphasis added) (Appendix to Petition, 155a). The Second Circuit's conclusion in *National Fuel Gas* (that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review," *id.* at 579) is error. It flies in the face of these FERC regulations, which contemplate regulation by state and local authorities.

State and local review, licensing, and certification are in fact an integral part of FERC's implementation of NEPA. In approving NFG's proposal, FERC referred specifically to the necessity for NFG to secure "stream crossing and road crossing permits with the appropriate authorities." 44 F.E.R.C. (CCH) ¶ 62,015 (App. C of Petition, 37a–42a). Both

FERC regulations and orders pertaining to this NFG proposal plainly direct that the State of New York (which is the appropriate authority) supplement FERC's consideration of environmental impact.[5]

It is true that the Second Circuit addressed the FERC regulations, albeit summarily. FERC had directed NFG to secure necessary permits. The Second Circuit chose neither to enforce compliance with the FERC orders nor remand the question to FERC, but instead abdicated, stating that "[t]o the extent that the PSC desires to challenge National Fuel's compliance with the FERC order, it may pursue whatever federal administrative and judicial remedies are available to compel that compliance." *National Fuel Gas* at 579. The keystones of the NEPA are prevention of unwarranted adverse environmental impact, open disclosure, and planning — not remedies for destruction wrought.

In order to mitigate degradation of the environment, the environmental study and planning must take place *first*, before construction. The "basic thrust of the NEPA legislation is to provide assistance for evaluating proposals for prospective federal action in the light of their future effect upon environmental factors, not to serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction." *Richland Park Homeowners Association, Inc. v. Pierce*, 671 F.2d 935, 941 (5th Cir., 1982).

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[5] Supplemental state environmental regulation has been part of the implementation of environmental law for decades. State regulation was not preempted in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 330 (1973) (Florida oil spill statutes were not preempted by the "pervasive system of federal control over discharges of oil" of the Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-75 (1970)); *Lake Carriers Association v. McMullan*, 406 U.S. 498 (1972) (Michigan water pollution statute demonstrated concern that it accord with federal law; Michigan regulation of water pollution by federally licensed cargo vessels not preempted); nor in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960) (federal laws which created a "comprehensive set of controls over ships and shipping" did not overcome presumption against preemption of Detroit's smoke abatement code).

Environmental studies should *precede* construction. *National Wildlife Federation v. Andrus*, 440 F.Supp. 1245 (D.C.D.C. 1977). By denying the PSC jurisdiction to certificate NFG prior to construction of the line, the Second Circuit defeats the purposes of the NEPA.

In addition, if the federal agency decision is a fully-informed and well-considered decision, complying with NEPA-mandated procedures, then judicial review should not be concerned with the merits of that decision. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980). The Second Circuit, however, has addressed the merits of FERC's decision in preempting the state certification process which was a part of the FERC orders. When an agency ruling or explanation is inadequate, the normal course is to remand the matter to the agency for reconsideration, not to allow the affected carrier to take a shortcut through the federal courts. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

FERC has promulgated regulations to implement the NEPA. The work left to the PSC is to more closely study the proposal, mollify the site-specific environmental effects of the project, and certify it when all studies are complete. The contribution of the PSC in mitigating deleterious environmental impact is necessary and integral to comprehensive federal law not only on the subject of natural gas but also of the environment. Congress intended the states to cooperate with the federal agencies "to create and maintain conditions under which man and nature can exist in productive harmony," NEPA, 42 U.S.C. § 4331 (1970).

CONCLUSION

For the above-stated reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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